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IN THE

Supreme Court of the United States

October Term, 1954

CASE NO. 752

HURLEY A. WALTERS, W. HOYT KNIGHT, OTIS ROLLISON, LEROY ROLLISON, LETROY GANTT, EDWARD S. LUCAS, and TEXTILE WORKERS UNION OF AMERICA, CIO, LOCAL 254,

Petitioners,

VS.

FRANK WHEELER HALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA, AND THE COURT OF COMMON PLEAS, RICHLAND COUNTY, SOUTH CAROLINA

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IN THE

Supreme Court of the United States

October Term, 1954

CASE NO. .....

HUBLEY A. WALTERS, W. HOYT KNIGHT, OTIS ROLLISON, LEROY ROLLISON, LETROY GANTT, EDWARD S. LUCAS, and TEXTILE WORKERS UNION OF AMERICA, CIO, LOCAL 254,

Petitioners,

vs.

FRANK WHEELER HALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA, AND THE COURT OF COMMON PLEAS, RICHLAND COUNTY, SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on January 3, 1955, affirming a judgment of the Court of Common Pleas, Richland County.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of South Carolina, printed in Appendix A hereto, *infra*, pp. 25-34, is unofficially reported in 85 S. E. (2d) 729. The order and decision of

the Supreme Court of South Carolina denying the Petition for Reargument is unreported and is printed in Appendix B hereto, *infra*, p. 46.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on January 3, 1955, *infra*, pp. 25-34. A timely Petition for Reargument was filed January 13, 1955, and is printed in Appendix B, hereto, *infra*, *pp.* 35-45. The Petition was denied in a decision and order dated February 3, 1955, *infra*, p. 46.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3) since the validity of a state's statute on the ground of repugnancy to Article XIV of the Constitution of the United States of America is drawn in question by the decision and judgment of the Supreme Court of South Carolina.

QUESTIONS PRESENTED

A statute of South Carolina permits suits to be filed against unincorporated associations in their common name, without joining or serving the individual members thereof, and provides that the judgments entered in such suits may be satisfied out of the individual property of any member of the association, without further notice or hearing. The statute does not permit unincorporated associations to sue, or counterclaim, in their common name.

As construed in this case, the statute is not merely a procedural device to permit a single suit against the asso-

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ciation to be brought for the adjudication of the individual liabilities of the members, but makes the association liable, as an entity, for its own torts, without proof of any tortious actions by the individual members or of authorization or ratification of the association's actions by such members—the judgment, nevertheless, remaining recoverable against the assets of each individual member.

The questions presented are:

1. Whether South Carolina may, consistent with the Due Process requirements of the Fourteenth Amendment, permit a suit to be filed against an unincorporated association *eo nomine*, and permit the judgment recovered therein to be satisfied out of the individual property of the members, without any notice or hearing for such individual members.

2. Whether the South Carolina statute is made unconstitutional when it is construed, as it was here, as permitting the judgment against the association (which can be enforced against the individual property of the members) to be based on the association's actions as an entity, without allegation or proof that the members authorized, participated in or ratified such tortious actions.

3. Whether the statute of South Carolina, insofar as it authorizes suit *against* an unincorporated association in its association name but prohibits unincorporated associations from *bringing* suits in their association name, deprives the Petitioners of "due process" and "equal protection of the laws."

STATUTE INVOLVED

The statute involved is Sections 7796, 7797 and 7798 of the 1942 Code of South Carolina, which provides as follows:

> "7796. All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known, without naming the individual members of the Association.
>
> "7797. Process served on any agent of any unincorporated association doing business in this State, under the name and style by which it is usually known, shall be sufficient to make such association a party in any court of record in the county in which such agent may be served.
>
> "7798. On judgment being obtained against such association under such process, final process may issue to recover satisfaction of such judgment, and any property of the said association, and the individual property of any copartner or member thereof, found in the State, shall be liable to judgment and execution for satisfaction of any such judgment."

STATEMENT

Petitioner, Local Union No. 254, Textile Workers Union of America, CIO, is a labor union and an unincorporated association. It is composed of about 1600 to 1700 members. The membership consists of employees of the several cotton mills of the Pacific Mills, Inc., located in Columbia, South Carolina (R. 2, 3, 6).[1]

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[1] The reference is to the printed Transcript of Record in the Supreme Court of South Carolina.

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In 1951, the majority of the members of Local No. 254 present at a meeting of the Local Union voted to strike for improved wages and other conditions of employment. The vote was not unanimous and only a fraction of the Local's total membership participated in the vote (R. 303).

During the course of the strike which ensued, a personal altercation took place between a member of the Union and a non-striking employee. The Union member involved was neither an official of the Local nor one of the Union pickets (R. 196). In fact, he was not even employed at the plant where the altercation occurred (R. 344). The wrong complained of occurred while he was walking to his father's house to perform a family chore (R. 346).

During the quarrel the Respondent was struck a single blow which caused a small swelling on the back of the head. The Respondent sought treatment for the injury only once, some 24 hours after the accident. The treatment consisted of the application of an antiseptic to the injured area. The Respondent neither sought nor was accorded or required any further treatment for the injury (R. 163, 164, 165).

About a year later this action was commenced. The Respondent asked actual and punitive damages of $50,000.00 against Local 254, The Textile Workers Union of America, the parent International Union with which it was affiliated and 6 named individual members of the Local Union (R. 6). The Local and International Union were sued in their association name. They were brought before the court by service on their respective agents. Other than the 6 named members, the individual members of the Unions were not named as parties or served with process. The suit was

brought pursuant to Sections 7796, 7797 and 7798 of the 1942 Code of South Carolina, *supra.*

The statute in issue had its genesis in enactments which date back to 1865. It has been construed by the highest court of the State and found constitutional and not in violation of the "due process" clause. *Ex Parte Baylor,* 93 S. C. 414; *Medlin* v. *Methodist Church, et al.,* 132 S. C. 498; *Elliott* v. *Presbyterian Church,* 181 S. C. 84. Prior to this case it had been interpreted by the Supreme Court of South Carolina as having wrought merely a procedural change in the common law suability of members of an unincorporated association and it had been justified as a convenient method of substituted service upon the members *which still required substantive proof of the liability of each and every member of the association before judgment might be recovered against the association.*

> ". . . The statute does not contemplate an action against the association as if it were a corporation. An unincorporated association is in no sense a legal entity and is not made so by the statute. Prior to its passage, great difficulty was experienced in making the individual members parties. The liability is theirs, and to render it more conveniently enforceable, the statute permits the association to be sued by its accustomed name, and provides that the execution issued upon the judgment in such case may be levied upon the property of the association and upon that of the individual members." (*Medlin* v. *Methodist Church, et al., supra,* p. 502.)
>
> ". . . *This is the only construction that can be placed upon the statutes, since, of course, an unincorporated association is not such an entity as can sue or be sued in its name, and simply as an association,* and

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> when an agent of an unincorporated association is served with a summons and complaint, with such association named as the defendant, then each and every member of the association is as fully and effectively made a party defendant, and served, as if he had been named in the summons and complaint as a defendant, and personally served." (*Elliott* v. *Presbyterian Church, supra*, p. 96.) (Emphasis supplied)

Before trial, the Union parties demurred to the complaint on the ground that the complaint failed to state a cause of action in that the liability of each member of the association for the wrong complained of was not alleged (R. 7, 8). The demurrers were overruled (R. 10-13).

The case was tried before a jury in the Court of Common Pleas for Richland County, South Carolina. At the end of the Plaintiff's case a non-suit was granted to the International Union (R. 240). After four days of trial, the jury, after *forty-five (45) minutes* of deliberation, returned a verdict against the Petitioners in the amount of $1,000.00 compensatory or actual damages, *and $25,000.00 punitive damages* (R. 435).

After the verdict the Petitioners moved for judgment notwithstanding the verdict or, in the alternative, for a new trial on the grounds, among others, that there was no proof of the liability of the members of the association for the wrong complained of and that the amount of the compensatory and punitive damages demonstrated that the verdict was a product of passion and prejudice (R. 440-444). The motion was denied (R. 444-447). Exceptions embodying the grounds of objections contained in the demurrers and trial motions were duly filed (R. 447-454).

The Petitioners appealed to the Supreme Court of South Carolina. They presented the Court with their previous *Medlin* and *Elliott* decisions and requested that the judgment of the lower court be set aside in that it was bottomed on an erroneous interpretation of the relevant statute since it treated the association as a juridical entity and allowed judgment against the association and its members individually in the absence of allegation and proof of the guilt or liability of each member for the wrong complained of.

The Supreme Court of South Carolina affirmed the judgment of the lower court. For the first time, it decided to treat an unincorporated association as a substantive entity, separate and apart from the members who comprise it, for purposes of imposing liability on the association and its members individually. By its decision it placed an interpretation on its statutes, which it had, by previous decisions, disavowed.

Thus, in South Carolina, the joint property of members of an unincorporated association and also their separate and individual estates may be simultaneously seized and sold to satisfy an obligation of a separate legal entity though the members have neither consented to, authorized, participated, acquiesced in or ratified the act out of which the obligation arose. Indeed, a member's total property is subject to forfeiture on account of association acts or defaults of which he may have no knowledge.

On January 13, 1955, Petitioners filed a timely Petition for Reargument, *infra*, pp. 35-45 They asserted in their Petition that the decision of the South Carolina Supreme Court had overturned the Court's construction of the statute enunciated in the *Elliott* and *Medlin* cases, *supra*, and

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established a new and novel rule of liability for the members of unincorporated associations in South Carolina. They complained that the statute and the construction placed thereon were invalid because they violated the Due Process and Equal Protection guarantees of the Fourteenth Amendment to the Federal Constitution.

> "If the Statutes under discussion are to be so construed as to permit a judgment against one not brought into Court by virtue of its process, as is done by the opinion in this case, then those statutes violate the 'due process' and 'equal protection' clauses of the Fourteenth Amendment to the United States Constitution." (*infra*, p. 44.)

On February 3, 1955, the Chief Justice of the South Carolina Supreme Court and his four associate justices[2] issued an order and decision denying the Petition for Reargument, *infra*, p. 46.

It is clear that the assertion of Federal rights was actually considered and determined by the Supreme Court of South Carolina both in arriving at its original decision and also its order denying the Petition for Reargument. This is the undeniable meaning attributable to the decision denying reargument.

> ". . . we find that none of the matters referred to therein was either overlooked or misapprehended by the Court in the preparation of the judgment heretofore filed; . . ."

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[2] This is the same panel which joined in the decision of the Court dated January 3, 1955.

REASONS FOR GRANTING THE WRIT

The statute of South Carolina which is in question governs the individual interests, rights and property of the thousands of members of unincorporated associations in South Carolina. The confiscation of the property and interests of members of such organizations as churches, veteran groups, chambers of commerce and other trade groups, lodges, labor unions, political parties, bar and other professional organizations are in question. Moreover, as construed, the statute serves to deter persons from joining labor unions, churches, political parties and other unincorporated associations. It thus stifles the growth and development of groups which are making considerable and essential contributions to the social, economic, political, cultural and religious welfare of South Carolina.

Perhaps even more significant is the intrinsic importance of the questions presented to the basic notion of Due Process and Equal Protection as enunciated by this Court. In this sense the queries sought to be reviewed are of wide import under the Constitution and speak to the preservation of the rights of all of the people of the United States. For if the property and rights of one group of individuals may constitutionally be seized and disposed of without notice and an opportunity to be heard and defend, then the rights of all other persons are in similar jeopardy. At this stage of the proceedings only the intervention of this Court can remedy the infraction and preclude the erosion of our constitutional liberties.

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A. A Statute Which Permits an Unincorporated Association to Be Sued and a Judgment to Be Entered Which Can Be Enforced Against the Individual Property of All of the Members of the Association, Without Affording Them Notice or an Opportunity for Hearing, Violates Due Process of Law.

We believe that the decisions of this Court, the lower Federal Courts and other State Courts establish that the South Carolina statute, even as construed by the Supreme Court of South Carolina in its earlier *Medlin* and *Elliott* cases, is unconstitutional. As thus construed, the statute is a procedural device for enforcing the individual responsibilities of each of the members of an unincorporated association without serving them with process or giving them an opportunity to be heard. As such, its operation would be in direct conflict with the principles announced by this Court in numerous decisions. Its probable unconstitutionality has long been recognized.

Prof. Edward H. Warren in his authoritative treatise "Corporate Advantages Without Incorporation," in analyzing the South Carolina statute in question, expressed strong doubts as to its constitutionality.

> ". . . Whether it is lawful to give judgment (which may be satisfied out of separate property) against such a debtor, even if he is a citizen or resident of the state, is a question which, so far as we know, has not yet been answered by the Supreme Court of the United States. In other words, we do not think it clear that the decision in *Ex Parte Baylor* would have been sustained by the Supreme Court of the United States if the case had been carried to that court." (p. 554.)

See also: Dodd, "Dogma and Practice in the Law of Associations," 42 Harv. Law Review 977, 999, 1000.

In the leading case of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this Court declared unconstitutional a Florida statute which allowed judgment creditors of a corporation, where the judgment could not be satisfied out of the corporate assets, to execute against the separate property of individual stockholders to the extent of the amount remaining unpaid on their stock subscription. Said the court:

> "Thus construed, and as applied in this case, we think section 2677 is repugnant to the 'due process of law' provision of the 14th Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; . . .
>
> "It may be conceded that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may consistently with the 14th Amendment be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged. *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 59; *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, *he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or*

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fraud, whether he is a stockholder and indebted, and other defenses personal to himself. See Great Western Telegraph Co. v. *Purdy, ubi supra; Bernheimer* v. *Converse*, 206 U. S. 516, 528, 532; *Converse* v. *Hamilton*, 224 U. S. 243, 256; *Selig* v. *Hamilton*, 234 U. S. 652, 669." (Emphasis added) (pp. 422, 423.)

In *Hansberry* v. *Lee*, 311 U. S. 32, Chief Justice Stone, speaking for a majority of the Court, described the constitutional necessities of a judgment *in personam* as follows:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer* v. *Neff*, 95 U. S. 714; 1 *Freeman on Judgments* (5th ed.), §407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. §905, 28 U. S. C. §687, prescribe, *Pennoyer* v. *Neff, supra; Lafayette Ins. Co.* v. *French*, 18 *How.* 404; *Hall* v. *Lanning*, 91 U. S. 160; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464; *Old Wayne Mutual Life Assn.* v. *McDonough*, 204 U. S. 8." (pp. 40, 41.)

In *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky*, 247 U. S. 464, this Court found that "due process"

could be satisfied in the enforcement of a judgment only after a genuine opportunity to be heard:

> ". . . The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." (p. 476.)

See also: *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Sugg* v. *Thornton*, 132 U. S. 524; *Hall* v. *Lanning*, 91 U. S. 160; *First National Bank of Chicago, et al.* v. *Comm. of Internal Revenue*, 112 F. 2d 260; *United States* v. *Lam*, 26 F. 2d 830; *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 F. 2d 798; *Road Improvement Dist. No. 2 of Conway County, et al.* v. *Missouri Pac. R. Co.*, 275 F. 600, 604.

In the case of *Pink, Supt. of Ins. of the State of N. Y.* v. *A. A. A. Highway Express, Inc., et al.*, 314 U. S. 201, 208, a New York judgment against a Mutual Insurance Company was sought to be enforced against the Company's stockholders in their capacity as members of the Company in a suit brought in Georgia. A unanimous Court, speaking through Chief Justice Stone, made it clear that the per-

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sonal liability of members could only be enforced in a new and separate suit in which personal defenses could be availed.

See also: *Sylvan Beach, Inc.* v. *Koch, et al.*, 140 F. 2d 852, 861.

A statute which would make a judgment against an association binding on the separate property of associates has been condemned in the State Courts as well. *Gale* v. *Townsend*, 45 Minn. 357; *Jardine* v. *Superior Court of Los Angeles County, et al.* (not officially reported), 293 P. 117, reversed on other grounds 213 Cal. 301, appeal dismissed 284 U. S. 592.

The South Carolina statute, even as construed in the earlier *Medlin* and *Elliott* cases provides a procedure for adjudicating the tort liability of all of the members of an unincorporated association without making them parties to the litigation. The judgment rendered in such litigation is not made, as in somewhat similar statutes in other states, *prima facie* evidence of individual liability. There is no individual right to attack the judgment against the association as fraudulent or collusive, or to assert other personal defenses. The judgment rendered in the suit against the association runs against each individual member. It may be satisfied out of each member's assets and all of his property is summarily subject to execution and sale. Such a statute, we submit, cannot satisfy the requirement of the Fourteenth Amendment that no person shall be deprived of his property without due process of law.

B. When the South Carolina Statute Was Construed to Permit Judgment Against the Association, Without Allegation or Proof of Individual Liability of the Members, It Became, A Fortiori, Unconstitutional.

We have urged above that even if it were assumed that the South Carolina statute is merely a procedural device, it would be invalid because it provides for a method of determining that the individual members of the association are each legally liable to the plaintiff without affording them notice or an opportunity to be heard. But the decision of the Supreme Court of South Carolina here, overruling in effect its *Medlin* and *Elliott* decisions and, for the first time, giving substantive as well as procedural meaning to the statute, makes it clear that the statute is invalid.

The distinction between the new and the old construction of the statute is most clearly seen by examining the usual construction of similar statutes in other states.

By 1947 it was estimated that at least 25 states had enacted statutes making associations suable in their common names. Another 10 states permitted representative suits against the members in any form of action. Even in the 13 remaining states, waiver, estoppel, representative suits in equity, and other devices are frequently employed to render unincorporated associations suable in the same manner as incorporated associations.[3] In all of the states the statutory and judicially changes in the suability of associations have been, almost universally, construed as having wrought only a procedural change so that the substan-

[3] House Minority Report No. 245 on H. R. 3020, pp. 108, 109 (1947); Senate Report No. 105 on S. 1126, p. 17 (1947); Teller, "Labor Disputes and Collective Bargaining," Chapter 25, pp. 1362-1375.

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tive liability of the association can be established, as at common law, only by proof that each member either participated in, authorized, consented to or ratified the wrong complained of.[4] Significantly, in none of the states, except South Carolina, is the separate property of members subject to execution to satisfy judgments against the association.

The usual construction is summed up by Prof. Sturges in his oft cited article "Unincorporated Associations As Parties to Actions," 33 Yale Law Journal 383, 401, 402, as follows:

> "In the case of non-partnership associations, on the other hand, the jural liabilities of the associates are determined by the rules of agency law. Each associate must consent within those rules before a

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[4] *Feldman* v. *North British & Mercantile Ins.*, 137 F. 2d 266; *Sperry Products, Inc.* v. *Association of American Ry., et al.*, 132 F. 2d 408, cert. den. 319 U. S. 744; *Cox* v. *Government Employees Ins. Co.*, 126 F. 2d 254; *Scanlon* v. *Duffield*, 103 F. 2d 572; *McNutt* v. *United Gas Workers, et al.*, 108 F. Supp. 871; *American Newspaper Guild* v. *Mackinnon, et al.*, 108 F. Supp. 312; *Fredstrom* v. *Giroux Post, etc.*, 94 F. Supp. 983; *City of Birmingham* v. *Fairview Home Owners Assn., et al.*, 259 Ala. 500; *Security-First National Bank of Los Angeles* v. *Cooper, et al.*, 62 Cal. App. 2d 653; *Webb & Martin, Inc.* v. *Anderson-McGriff Hardware Co., et al.*, 188 Ga. 291; *Chicago Grain Trimmers Assn.* v. *Murphy*, 389 Ill. 102, *Whitehead & Hoag Co.* v. *Donovan*, 210 Ill. App. 268; *Malloy* v. *Carroll*, 287 Mass. 376; *Sweetman* v. *Barrows*, 263 Mass. 349; *Stone* v. *Guth, et al.*, 232 Mo. App. 217; *Martin* v. *Curran, et al.*, 303 N. Y. 276; *Knopp* v. *Sherwood*, 239 App. Div. 475, aff'd 265 N. Y. 591; *Hale* v. *Hirsch* (N. Y.), 205 App. Div. 308; *Dunkel* v. *T. B. McDonald Const. Co., Inc., et al.* (not officially reported) (N. Y.), 67 N. Y. S. 2d 515; *Tannenbaum* v. *Hofbauer* (N. Y.), 142 Misc. 120; *Ionic Lodge* v. *Ionic Lodge*, 232 N. C. 648; *Venus Lodge* v. *Acme Benevolent Assn.*, 231 N. C. 522; *American Art Works* v. *Republican State Committee*, 177 Okl. 420; *Cousin* v. *Taylor*, 115 Or. 472; *Wortex Mills* v. *Textile Workers Union of America, et al.*, 380 Pa. 3; *Dunlap Printing Co.* v. *Ryan*, 275 Pa. 556.

transaction is binding upon that one. All of the associates must consent within those rules before an 'association transaction' can be consummated. This is plaintiff's case when the associates are named in their several names. Is it changed by using the common or association name? If suit is brought against the associates by their association named, which names all of the associates, is it not to establish an 'association responsibility' and will not plaintiff therefore have to prove the responsibility of *all* on the basis of agency law as a condition of using the common name? The New York courts have answered this question in the affirmative under the New York statute. The plaintiff cannot employ the statutory method unless there is proof of responsibility of *all* the members. 'It is essential to a right of recovery in such a case that the cause of action was one for which an action might be maintained against the 30,000 members of the United Association.' " (Footnotes omitted.)

Relying on this kind of reasoning, and the earlier decisions of the Supreme Court of South Carolina, Petitioners in this case urged the Supreme Court of South Carolina to reverse the judgment below because there was no allegation and no proof that each of the individual members of the Union was personally responsible for the tort complained of. Admittedly, they had not participated in the tort and the membership had not been shown to "expressly or impliedly with full knowledge authorize or ratify the specific acts in question."[5]

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[5] Wrightington, "Unincorporated Associations", p. 276 (1916); Oakes, "Organized Labor and Industrial Conflicts," Sec. 48, pp. 49, 50.

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The Court, however, pushed aside this contention. The union, it said, was itself liable in tort for all acts done pursuant to the conspiracy between its officers and the named members made defendants in this suit. Thus, the Court construed the South Carolina statute as providing that an unincorporated association could itself be held responsible, as an entity, for its own torts, committed by its officers and agents within the scope of the authority given them by the Union. The Union, in short, was treated as a corporation.

We do not contend that a state may not constitutionally so treat an unincorporated association. Indeed, such treatment would seem to correspond to the realities of life. But we do contend that this result connot constitutionally be reached by construction of a statute which makes a judgment against the Union a personal judgment against each of its members. Yet this is precisely what was done in this case. The Union is held responsible for its torts without proof that the members have either participated in or authorized the tort. A judgment is entered which runs against each of the members, and which can be satisfied out of their individual assets.[6] A substantive equation is thus established under which an unincorporated association is liable, as a corporate entity, for its torts and, at the same time, each member of the association is, without

[6] It is important to emphasize that the judgment thus obtained is not limited to the joint or association assets of members, or to amounts owed by the members to the association for stock or on assessments, as in the *Coe* and *Pink* cases in this Court. All of the property of each of the members is made subject to execution to satisfy a judgment against the association which rests on a theory of association liability, not on a theory of individual liability.

more, subject to the judgment as if there were no corporate entity.

This juridical paradox is in striking contrast to the treatment by this Court of membership liability in unincorporated associations. In *United States* v. *White*, 322 U. S. 694, a union officer refused to produce union records when subpoenaed and sought the protection of the Fifth Amendment's self-incrimination provisions. He claimed that the Union, being an unincorporated association, its records were the property of all of its members and since he was a member he could not be compelled to produce the records if it would tend to incriminate him. The court rejected this argument. It held that an unincorporated union was in realty an artificial and impersonal entity and its property and activities cannot be said to represent the private property and private activities of its members:

> ". . . The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of the members. Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members of trustees. The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. See *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534. And no member or officer has the right to use them for

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criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor* v. *Loewe*, 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275." (pp. 701, 702, 703.) (Footnotes omitted)

To the same effect see *Guy* v. *Donald*, 203 U. S. 399.

We submit that the original construction of the statute violates procedural "due process" in its denial of notice and hearing to the members whose individual estates may be seized and sold to satisfy judgments against the association. Nevertheless, under this earlier interpretation, there was no association liability without proof of the guilt of each and every member. Now, under the new construction of the statute there is added to the prior constitutional failures a new substantive invalidity: it need not be shown that those who are liable are guilty of wrongdoing.

We have, in sum, a statute which permits a judgment to be rendered which runs against each member of an unincorporated association without serving such members with process and without giving them an opportunity to defend or to assert personal defenses, and which—as construed by the Supreme Court of South Carolina—permits the judgment which runs against each of the members to be issued without even proof, in absentia, that they are personally guilty. No distinction is drawn between those who were

members when the wrong-doing occurred and those who joined subsequently. All are equally liable and the property of each is subject to execution and sale to satisfy a judgment based on the association's guilt.

C. Sections 7796 and 7797 of the Statute Violate Due Process and Equal Protection.

Sections 7796 and 7797 of the Statute renders unincorporated associations susceptible to suit in their association name. It fails to accord the association the correlative right to sue in its association name. Thus suits brought to enforce obligations of unincorporated associations in South Carolina are properly brought in the name of the association-defendant. The right of the association to remedy wrongs and compel observance of its rights is, however, left subject to common law procedural disabilities which make it necessary to join each and every member of the association as party-plaintiffs. Equal access to the courts is thus denied, thereby barring equal pursuit of legitimate association activities and the equal protection and enjoyment of the property and interests of the association. The discernible aim of the statute appears to have been to cure the common law procedural disabilities which surround unincorporated associations. The means used are, however, arbitrary and oppressive. They bear no reasonable relation to the evil which they purport to abolish. The attempt at redress of evil has resulted in the perpetuation of an evil. The difficulty of suit is restricted by the state to unincorporated associations alone. No other form of organization is subject to similar oppression. Clearly the statutory scheme fails to accord unincorporated associations the Due Process and Equal Protection of the Laws guaranteed it by Article XIV of the U. S. Constitution.

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The rule is clearly phrased in *Truax* v. *Corrigan*, 257 U. S. 312:

> ". . . The Fourteenth Amendment, as this court said in *Barbier* v. *Connolly*, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or abitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' " (pp. 334, 335.)

In *Powers Manufacturing Co.* v. *Saunders*, 274 U. S. 490, this Court declared invalid a state statute which made foreign corporations amenable to suit in any county within the state regardless of where they did business. No similar burden was thrust upon others and no correlative right of venue was accorded the foreign corporation when it sought to uphold its rights within the state.

See also: Concurring Opinion of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 161-163; *Ex Parte Wells*, 99 F. Supp. 320.

The words of Chief Justice Taft in *Truax* v. *Corrigan*, *supra*, aptly sum up the failures and deficiencies of the statutory efforts of South Carolina:

> "... It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." (pp. 329-330.)

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Decision of Supreme Court of South Carolina

FRANK WHEELER HALL,

Respondent,

vs.

HURLEY A. WALTERS, *et al.*,

Appellants.

Appeal from Richland County

J. Woodrow Lewis and E. H. Henderson, Judges

Case No. 3867

Opinion No. 16944

Filed January 3, 1955

AFFIRMED

F. Ehrlich Thomson and John W. Foard, Jr., both of Columbia, for appellants.

Whaley & McCutchen and Hoover C. Blanton, all of Columbia, for respondent.

STUKES, A. J.: The respondent recovered verdict and judgment for $1000. actual and $25,000. punitive, damages against the six individual appellants, who are named in the caption; and against the Textile Workers Union of America

(CIO), Local 254. Textile Workers Union of America (CIO) which is referred to in the record as the "National Union", was awarded an order of nonsuit at the close of respondent's evidence, so it is not concerned with the appeal; and subsequent references herein to the union, and to the union appellant or appellant union, will be to Local No. 254.

It was alleged in the complaint that the unions were on strike against Pacific Mills of Columbia, including Capital City Mill where respondent, who was not a member of the union, was employed. He returned to work on May 16, 1951 when the strike was still in effect. He was warned on the day before by a member of the executive committee of the union that if he went to work next day there would be trouble. As he entered the mill to work he was told by another union official that he would be sorry for it. When he was leaving the mill at the end of his day's work he was accosted by several of the individual appellants and by others at the gate of the mill; was threatened, beaten and knocked to the ground by one or more of the appellants and chased for a considerable distance, flight being necessary to escape further injuries; he suffered pain, nervousness, etc. The appellant Lucas, who held several offices in the union, was in charge of the picket line and on duty at the mill at the time, instigated, participated in and superintended the alleged violence. There were also other union participants whose names are unknown to respondent. The purpose of the picket line was to prevent respondent and others, who desired to do so, from working in the mill. The appellants conspired and combined to prevent respondent from working, to threaten, frighten and injure him, which they did maliciously and in violation of his constitutional rights. The officials of the union, in the scope and course of their duties as such, authorized and supervised the foregoing activities which were approved and ratified by the union, or they acquiesced in the same, all of which was

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in connection with, and in furtherance of, the strike which was then under way. The unions have large cash resources and are otherwise wealthy.

The union appellant demurred to the complaint upon the ground that it did not state a cause of action against it because (1) its alleged acts are not actionable, and (2), in effect that the strike was not unlawful, wherefore actual and punitive damages are not recoverable. The demurrer was overruled by order which held, in substance, that the action was to enforce liability for the alleged tort against respondent, and the union is subject to suit as an unincorporated association, without naming the individual members of it, under the Code Sections which are Nos. 10-215, 10-429 and 10-1516 of the Code of 1952. It was further held that the union is liable for the unlawful acts of its agents, that the basis of the suit is not the strike but the alleged unlawful acts done in pursuance and furtherance of it. The right to strike was recognized. The order concluded: "The gravamen of the charges here is that in the exercise of a legal right, unlawful means and acts were used resulting in damages to this plaintiff. See: Annos., 27 A. L. R. 786, 149 A. L. R. 508; 31 Am. Jur., section 295, et seq., page 980. The complaint states a cause of action against the defendants and the demurrers are overruled."

The suit was brought, insofar as the union was concerned, pursuant to sections 7796 et seq. of the Code of 1942, to which the above cited sections of the 1952 Code correspond; they follow:

> "7796. All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known, without naming the individual members of the association.
>
> "7797. Process served on any agent of any unincorporated association doing business in this State, under the name and style by which it is usually

known, shall be sufficient to make such association a party in any court of record in the county in which such agent may be served.

"7798. On judgment being obtained against such association under such process, final process may issue to recover satisfaction of such judgment, and any property of the said association, and the individual property of any copartner or member thereof, found in the State, shall be liable to judgment and execution for satisfaction of any such judgment."

The action came on for trial upon the complaint and answers which constituted, in effect, general denials, and resulted in the verdict and judgment above stated. None of the appellants made a motion for a directed verdict and their motion for judgment notwithstanding the verdict was, therefore, properly overruled on that ground. Circuit Court Rule 79. Gleaton vs. Sou. Ry. Co., 208 S. C. 507, 38 S. E. (2d) 710. Standard Warehouse Co. vs. A. C. L. R. R. Co., 222 SC 93, 71 S. E. (2d) 893. For the same reason the present contention that the evidence was inadequate to establish a conspiracy is untenable on appeal. However, the proof was ample and included evidence of ratification by the union. When the member who committed the assault and battery upon respondent was prosecuted in the criminal court, union officials arranged his bond and provided for payment of his fine. The pickets who threatened and chased respondent were retained. There was nothing in the evidence to combat the conclusion of ratification.

The union is an unincorporated association and its liability to suit and process is fixed by the foregoing statute which was applied in the following decisions: Ex parte Baylor, 93 S. C. 414, 77 S. E. 59; Medlin vs. Ebenezer Methodist Church, 132 S. C. 498, 129 S. E. 830; Elliott vs.

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Greer Presbyterian Church, 181 S. C. 84, 186 S. E. 651; and Edgar vs. Sou. Ry. Co. et al., 213 S. C. 445, 49 S. E. (2d) 841.

The last cited case was an action for damages against a labor union for conspiracy and its liability therefor, if proved, was not questioned. Upon later trial of the action there was a nonsuit as to the union on the facts, not the law. 224 S. C. 65, 77 S. E. (2d) 350. Other recent cases in this court (reported as one) in which it appears that it was unquestioned that a labor union may be sued for damages for tort and conspiracy are Bowen and Bannister vs. Bricklayers, Masons & Plasterers International Union of America et al., 225 S. C. 29, 80 S. E. (2d) 343.

Unincorporated associations are generally elsewhere held to be liable in tort, 7 C. J. S. 42, Sec. 16, 4 Am. Jur. 483, Sec. 43, as are their members, 7 C. J .S. 79, Sec. 32c, 4 Am. Jur. 484, Sec. 44. Numerous decisions so holding labor unions are collected in the annotations which are cited in the order overruling the demurrer to the complaint, supra.

One of appellant union's grounds for its unsuccessful motion for nonsuit was that the union, being an unincorporated association, has no entity or existence apart from that of its members and being a legal nonentity cannot be a co-conspirator. Assuming, without deciding, this, there can be no doubt that the officers and members of the union are capable of entering into a conspiracy and when a tortious act is committed in furtherance of the purpose of the union, the union is liable for all acts done pursuant to such conspiracy to which through its officers it is a party. This was the view taken by the learned Circuit Judge as will be seen from his remarks in the order refusing a new trial hereinafter quoted. The fact of the union's elaborate organization and existence cannot be escaped. That it is

powerful is demonstrated by the facts in evidence in this case. The mill was closed again on the day after respondent was manhandled, and was able to re-open only after the strike was settled sometime later. Our statute contemplates that an unincorporated association will have agents, *eo nomine;* and it is undisputed that the appellant union had many, of various and sundry titles. Its liability for damages for conspiracy entered into between its officers and members, which was proven here, is indicated by our former decisions which have been cited.

In the order refusing new trial of the case the court reasoned and concluded as follows: "Members of an unincorporated association are jointly and severally liable for the obligations of the association. * * * Members of such associations are all principals. Two or more members of an unincorporated association can conspire with each other, or with another member acting as agent and representative of the association. If all 1700 members of the union had been named as defendants, there can be no doubt that all of them could be guilty of a conspiracy. The fact that each member was not expressly named leaves the result unchanged, for the statute merely provides a convenient way to bring all of them into court. * * * All of the members of the association would be liable if one of the association officers or agents, acting for and on behalf of the union in the scope of his agency, took part and joined in the conspiracy. 7 C. J. S. 42. There is evidence in the present case from which the conclusion may be drawn that Mr. Kirkland, the business agent, also the captains and lieutenants of the picket line, and others, acting within the scope of their agency, joined in the conspiracy to use force in preventing non-union employees from working at the mill."

The following decisions from other jurisdictions sustain the joinder of an unincorporated union and its, or some of its, members as defendants in an action based upon con-

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spiracy, as here: F. R. Patch Mfg. Co. vs. Protection Lodge, 77 Vt. 294, 60 A. 74, 107 A. S. R. 765; Albrecht vs. Kinsella, 7 C. C. A., 119 F. (2d) 1003; Moore vs. Cooks' etc. Union No. 402 et al., 39 Cal. App. 538, 179 P. 417; Heitkemper vs. Cent. Labor Council et al., 99 Or. 1, 192 P. 765; Clarkson vs. Laiblan et al., Mo., 161 S. W. 660; Clarkson vs. Laiblan, Mo., 216 S. W. 1029; Fife vs. Great A. & P. Tea Co. et al., Pa., 52 A. (2d) 24; Malone vs. Brotherhood of Locomotive Firemen et al., N. J., 110 A. 696; Pennsylvania Greyhound Lines vs. Amalgamated Asso. etc., 98 F. Supp. 789, 105 F. Supp. 537; Martineau vs. Foley et al., Mass., 120 N. E. 445; Ellis vs. Journeymen Barbers' International Union of America, Local Union No. 55, et al., 194 Iowa 1179, 191 N. W. 111, 32 A. L. R. 756; United Electric Coal Cos. vs. Rice et al., 22 F. Supp. 221; and Harvey vs. Chapman, Mass., 115 N. E. 304.

We are not presently concerned with, and express no opinion as to, the attempted action of a member against his union, as in Hromack vs. Gemeide, Wis., 298 N. W. 587, and Marchitto vs. Central R. Co. of N. J. et al., N. J., 88 A (2d) 851, which are cited in the brief of the appellant union. And our governing statute, quoted above, is materially different from that of the State of New York. Martin vs. Curran et al., 101 N. E. (2d) 683, also cited in the brief. The court virtually apologized for their statute in the opinion in the cited case when it said: "So, for better or worse, wisely or otherwise, the Legislature has limited such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven. * * * But, anamalous or not, such is the law, and this court does not revise statutes, in an effort to eliminate seeming injustices, or to bring the law into accord with modern fact."

Error is assigned because of the submission to the jury of the liability of the appellants for the conspiracy and

resulting damages, and also the liability of the union appellant by reason of the acts of its agents, who are the individual appellants. In other words, two causes of action were submitted to the jury—conspiracy and liability upon *respondeat superior*—and exception is taken.

However, there was no motion to require respondent to elect, and after the jury were instructed as to both theories of liability, counsel for appellants did not object. Act No. 27 of 1953, 48 Stat. 28, provides that after the court shall have charged the jury, they shall be excused and in their absence counsel may enter objections to the charge or request additional instructions. That procedure was carefully followed in the trial of this case, after the jury had been instructed on the law of conspiracy and also the union's liability *respondeat superior*, whereupon it was incumbent upon counsel to object to the charge in that respect in order to save the point for appeal, which was not done in this case although expressly solicited by the court. It is, therefore, not now available to appellants. Indeed, counsel announced, "We accept the charge * * *."

A further ground of appeal is the admission in evidence of the fact of a bodily attack upon another strike-breaker when she undertook to enter the mill to work on the morning of the day on which respondent was assaulted during the afternoon as he left the mill. We think that there was no error. It is elementary that in proof of conspiracy the field of the admissibility of pertinent evidence is broadened. State vs. Hightower, 221 S. C. 91, 69 S. E. (2d) 363. In addition to the regular pickets on duty at the gate of the mill there were on this morning, when it was known that the mill would try to reopen, a large crowd of strikers, two of whom assaulted this other worker as she entered and the violence was ended by the intervention of a union official when prompted to do so by a deputy sheriff. The latter was there to try to preserve order.

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There remains for consideration only the alleged excessiveness of the amount of punitive damages included in the verdict, which has caused us concern. There is no exception as to the amount of actual damages and our discussion will be confined to the award of punitive damages.

Such damages in the amount of $15,000 were affirmed in Morrow vs. Evans, 223 S. C. 288, 75 S. E. (2d) 598, where it was said: "It may be conceded that in view of this court it is excessive in the sense that it is unduly liberal but that is an insufficient ground for reversal on appeal. Remedy lay within the power of the trial judge who, after consideration and in his discretion, declined to interfere, which is ordinarily, as here, final. The subject has been so fully discussed in several recent decisions that it need not be now dwelt upon. Bowers vs. Charleston & W. C. R. Co., 210 S. C. 367, 42 S. E. (2d) 705; Jennings vs. McCowan, 215 S. C. 404, 55 S. E. (2d) 522; Richardson vs. General Motors Acceptance Corp., 221 S. C. 14, 15, 68 S. E. (2d) 874; Vernon vs. Atlantic Coast Line Ry. Co., 221 S. C. 376, 70 S. E. (2d) 862."

A verdict against a labor union which included $100,000 punitive damages was sustained in United Const. Workers vs. Laburnun Const. Co., 1953, 194 Va. 872, 75 S. E. (2d) 694, affirmed, 347 U. S. 656, 74 S. Ct. 833, —— L. Ed. ——. Punitive damages of $25,000 were awarded and affirmed in the action for conspiracy of Charles vs. Texas Co., 199 S. C. 156, 18 S. E. (2d) 719. See generally, on the award of punitive damages, Davenport vs. Woodside Mills, 225 S. C. 52, 80 S. E. (2d) 740.

There is evidence in the record of ownership of property by the appellant union and its dues-paying membership of sixteen or seventeen hundred shows that on a per capita basis the burden of payment will not be heavy. Bearing in mind that the justification of punitive damages includes punishment of the tortfeasor or tortfeasors and

the object of deterring repetition of the tort by appellants or others, we cannot say that the amount of the verdict in this case is such as to shock the conscience of the court or to show that it was the result of prejudice, passion or other improper motive, in the absence of which this court will not reverse.

In the order refusing new trial, with respect to this ground, the trial court tersely said, and we agree: "The amount of damages was not the result of prejudice or passion. The plaintiff was seriously injured. The amount of punitive damages is not excessive. These were questions of fact for the jury to pass upon."

The union and the individual appellants filed separate briefs and stated different questions, all of which have been decided adversely to them by what has been said.

The exceptions are overruled and the judgment affirmed.

TAYLOR, OXNER and LEGGE, JJ., concur. BAKER, C. J., concurs in result.

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APPENDIX B

Petition for Reargument

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

HON. J. WOODROW LEWIS

AND

HON. E. H. HENDERSON

Judges

FRANK WHEELER HALL,

Respondent.

VS.

HURLEY A. WALTERS, W. HOYT KNIGHT, OTIS ROLLISON, LEROY ROLLISON, LETROY GANTT, EDWARD S. LUCAS, and TEXTILE WORKERS UNION OF AMERICA (C. I. O.) LOCAL 254,

Appellants.

Case No. 3867

Opinion No. 16944

Filed January 3, 1955

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

Now come your Petitioners, Hurley A. Walters, W. Hoyt Knight, Otis Rollison, LeRoy Rollison, LeTroy Gant, Edward S. Lucas, and Textile Workers Union of America (C. I. O.), Local 254, and respectfully request that this

Honorable Court do grant a rehearing and reargument of this case in respect to the opinion of this Court filed herein on January 3, 1955.

Reasons Relied Upon for Granting a Rehearing and Reargument

This case is a case of novel impressions in South Carolina, and the opinion filed herein is of far reaching effect and importance, not only to your Petitioners, but to all members of unincorporated associations in this State such as, for instance, the League of Women Voters, the American Legion, the South Carolina Bar Association, all unincorported churches, lodges, paternal benefit associations, etc., for the reason that the opinions in this case, if allowed to stand, will impose a liability upon the members of such unincorporated associations for tort that was never heretofore thought to exist, and which would make membership in such associations extremely perilous indeed.

On Page 4 of the opinion the Distinguished Author of the opinion seems to state that since the questions presented by this appeal as to the substantive liabilities of unincorporated associations and the members thereof for conspiracy were not raised in Edgar vs. Southern Railway Company, et al., 213 S. C. 445, 49 S. E. 2nd 841, and Bowen and Bannister vs. Bricklayers, Masons and Plasterers International Union of America, et al., 225 S. C. 29, 80 S. E. 2nd 343, it is to be assumed that such liability does in law and in fact truly exist.

With the utmost deference and respect to the Distinguished Author of the opinion, such an assumption is neither permissible nor legally proper.

In the Edgar Case, supra, the only legal issues presented to this Court were: 1. was the process served in that case sufficient to acquire jurisdiction of the respective dependants, and, 2. a question of the proper construction of the complaint, involving the pleadings.

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The sole and only question presented to this Court in the Bowen and Bannister cases was one of the Jurisdiction of the Court to hear and determine the issues presented by the Complaint and came before the Court upon the Dependants demurrer to the Jurisdiction of the Court.

Neither the Edgar case nor the Bowen and Bannister cases are authoritative precedents for the Court to declare that an unincorporated association and all of its members are liable for an unlawful conspiracy.

Black's Law Dictionary, Fourth Edition (1951), Page 1340, defines a "precedent" as follows:

> "Precedent—an adjudged case or decision of a Court of Justice, considered as furnishing an example or authority for an identical or similar case afterwards or a similar question of law."

Since the questions presented by this appeal were neither raised or decided in Edgar or Bowen and Bannister, the decisions of those cases may not be made the basis for the decision of this case, and if that was done, it was error.

With utmost deference and respect to the Court, we submit that the Court improperly construed those Sections of the Code which permit the members of an unincorporated associations to be sued in the name by which the association is commonly known. If we correctly understand the opinion as filed in this Case, the Court has held in effect, that the Code Sections under consideration changed the substantive liabilities of members of an unincorporated association, and that mere membership in an unincorporated association by, and of itself, makes a member of an unincorporated association liable for tort regardless of whether or not such member knew of, participated in, or ratified the commission of such tort.

Such a construction, in effect, overrules the construction placed upon those Sections by this Court in Medlin vs. Methodist Church, 132 S. C. 498, 129 S. E. 651.

It is an elemental rule of statutory construction that: "Such statutes are constitutional and are to be construed in the light of the purpose of their enactment." 4 Am. Jur., Page 486.

The purpose for which our statute was passed is clearly set forth in both the Medlin case and the Elliott case, where this Court Declared:

> "The statutes does not contemplate an action against the association as if it were a corporation. *An unincorporated association is in no sense a legal entity and is not made so by statute.* Prior to its passage, great difficulty was experienced in making the individual members parties. The liability is theirs, and to render it more conveniently enforceable, the statute permits the association to be sued by its accustomed name, and provides that the execution issued upon the judgment in such case may be levied upon the property of the association and upon that of the individual members." (Italics added)

The foregoing quotation shows clearly that the sole and only purpose in passing the statute permitting the members of an unincorporated association to be sued in the name of the association was for the convenience of those persons desiring to bring such actions. In that connection, it is significant that the statute does not permit the unincorporated associations to bring an action in the name by which it is commonly known, nor does the statute permit the unincorporated association the right to set up a counterclaim in an action where the association has been sued in the name by which it is commonly known.

The statute permitting the members of an unincorporated association to be sued in the name by which it is commonly known was passed by the General Assembly of South Carolina in 1865, ninety years ago, and over that

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long period of time it has never before been considered or construed as changing the substantive liability of an unincorporated association from what it was under the common, i.e., an unincorporated association could neither sue or be sued as an association at common law. The statute is purely procedural, and in no sense does it change the substantive rights and liabilities of the unincorporated association or that of its members. Hromack vs. Serneide, Wis., 298 N. W. 587, Marchito vs. Central Railway Co., of N. J., 88 atl. 2nd 851.

In Jardive vs. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. 2nd 756, 79 A. L. R. 291, the California Court in discussing such statutes said:

> "The many inconveniences of the rule were not wholly evaded by these exceptions, and statutes were widely adopted for the purpose of eliminating this procedural obstacle by permitting suits to be brought against the associates in the common or association name. The statute dealt solely with the manner of bringing actions, and were not intended to effect any change in the substantive law. Members of associations had the same rights and were subject to the same liabilities as before, only now they could be sued by a less complicated and cumbersome process."

The foregoing language was quoted with approval by the United States Court of Appeals for the District of Columbia in Operative Plasterers; etc. vs. case, 93 F. 2nd 56.

We respectfully submit that there is no decision from this State, or from any other Court, State or Federal, in which it was held that mere membership in an unincorporated association would make such member liable for the commission of a tort, on account of such membership.

The liability of a member of an unincorporated association for the commission of a tort is correctly stated in

Feldman vs. North British & Mercantile Insurance Company, et al., 137 F. 2nd (4 Cir.), 266. A case which arose in the Eastern District of South Carolina, an action for conspiracy allegedly committed by members of an unincorporated association.

In discussing the liability of the members of an unincorporated association for the commission of a conspiracy, Judge Soper declared that liability to be as follows:

> "It is generally held that an unincorporated voluntary association, formed to accomplish a common purpose, is bound to use the same care to avoid injury to others as natural persons, *but mere membership in the body or contribution of dues or money to effectuate the common purpose does not make all the members liable for unlawful acts of the association done without their participation and without their knowledge or approval.* Johnson vs. Miller, 63 Iowa 529, 17 N. W. 34, 50 American Republic 758; Sweetman vs. Barrows, 263 Mass. 349, 161 N. E. 272, 62 A. L. R. 311; Malloy vs. Carrol, 287 Mass. 376, 191 N. E. 661; Weston vs. Barnecoat, 175 Mass. 454, 56 N. E. 619; Muetze vs. Tuteur, 77 Wis. 236, 46 N. W. 133, 9 L. R. A. 86, 2D Am. St. Rep. 115; Pandolfo vs. Bank of Benson, (9 Cir.) 273 F. 48." (Italics added)

In Sweetman vs. Barrows, supra, a case also involving the liability of an unincorporated association and its members for an alleged conspiracy. The Massachusetts Supreme Judicial Court declared:

> "Mere membership in a voluntary association does not make all the members liable for the acts of their associates done without their knowledge or approval, and *liability is not to be inferred from mere membership.* Newel vs. Borden, 128 Mass. 31;

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Volger vs. Ray, 131 Mass. 439; Ray vs. Powers, 134 Mass. 22; Lawlor vs. Lowe, 235 U. S. 522, 59 L. Ed. 341, 35 S. Ct. 170. See Wilcox vs. Arnold, 162 Mass. 577, 39 N. E. 414." (Italics added)

Again, we say with utmost deference and respect that there is no decision from this or any other Court which holds that mere membership in an unicorporated association makes such member liable for unlawful acts of the association done without his participation and without his knowledge or approval.

At Page 4 of the opinion it is stated:

> "*However, the proof was ample and included evidence of ratification by the union. When the member who committed the assault and battery upon respondent was prosecuted in the Criminal Court, union officials arranged his bond and provided for payment of his fine.* The pickets who threatened and chased respondent were retained. *There was nothing in the evidence to combat the conclusion of the ratification.*" (Italics added)

The burden of establishing "ratification" was a burden that rested upon respondent. There is no testimony in the record from which it can be reasonably inferred that the union officials had any authority whatsoever to ratify an unlawful act of one member of the union so as to make another member of the union personally liable for the commission of such unlawful act, where such later member did not participate in the unlawful act and had no knowledge thereof.

Certainly, the mere election to a union office did not carry with it the power and authority to personally bind one member of the union for the unlawful acts of another member of the union. That fact can be judicially noticed

by this Court. But, however, if the union officials, here involved, did have such authority, which is denied, it was the duty and burden of the respondent to offer testimony of such authority. There is no testimony in the record from which it can be inferred that the union officials had any such authority to ratify the unlawful acts of one member of the union so as to bind the other members. It therefore follows, that since the union officials had no authority to ratify an unlawful act of one member of the union so as to bind another member of the union who did not participate in such unlawful act, and had no knowledge of the unlawful act there can be no ratification thereof.

If the opinion in this case should be allowed to stand and become the law of South Carolina, we are sincerely of the opinion that such law would violate both the spirit and the letter of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

Professor Warren in his Treatise Corporate Advantages Without Incorporation (this volume may be found in the Library of the University Law School) classifies and discusses the various State laws permitting members of unincorporated associations to be sued in the name of the association, in discussing the South Carolina Statutes after setting them out at page 553, has this to say:

"In Ex Parte Baylor, a previous suit had been brought against 'Union Burial Aid' in which it was alleged that the defendant 'Union Burial Aid' was an unincorporated union with a membership of over ONE THOUSAND (1000) individuals. The summons in that suit had been served upon the President of the association. Judgment had been entered and execution issued against the individual property of the petitioners who were members of 'Union Burial Aid'.

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"The petitioners alleged that no service had been made upon them; that the judgment and execution of which the petitioners have never until recently had any notice, were a cloud upon their respective titles, and they asked that the said purported judgment entered against them as individuals be set aside and declared null and void. They challenged the constitutionality of the provisions of the act on the ground that they were in contravention of the due process clause of the Constitution."

"But the Court held (P. 418) that the petitioners were before the Court by the substituted service provided by the statute, and that the statute was constitutional."

"In Medlin vs. Ebenezer Methodist Church, the Court said: (P. 502), 'The statute does not contemplate an action against the association as if it were a corporation. An unincorporated association is in no sense a legal entity and is not made so by the statute. Prior to its passage, great difficulty was experienced in making the individual members parties. The liability is theirs, and to render it more conveniently enforceable, the statute permits the association to be sued by its accustomed name, and provides that the execution issued upon the judgment in such case may be levied upon the property of the association and upon that of the individual members.' "

"Is it due process of law to provide that service on an agent shall be sufficient to sustain a judgment which may be satisfied out of the separate property of any of the unincorporated associates?"

"With respect to an associate who is not a resident of South Carolina, we should suppose it to be clear, under D. Arcy vs. Ketchum and Pennoyer vs. Neff, that it is not."

"Counsel for the petitioners in Ex Partee Baylor seem not to have mentioned these cases, and therefore presumably the petitioners were residents of South Carolina.

The reader will remember that in New Jersey there is a statute which assumes to make service upon one joint debtor sufficient to sustain a judgment which may be satisfied out of the separate property of any of the joint debtors (PP 195-196), and that the New Jersey Court, when considering the effect of the Fourteenth Amendment to the Constitution of the United States upon this provision, said that it made it unlawful to give judgment against one not brought into Court by virtue of its process, in case such debtor be not a citizen or resident of the State, 35 L. R. A. (N. S.) 312."

"Whether it is lawful to give judgment (which may be satisfied out of the separate property) against such a debtor, even if he is a citizen or resident of the State, is a question which, so far as we know, has not yet been answered by the Supreme Court of the United States. In other words, we do not think it clear that the decision in Ex Partee Baylor would have been sustained by the Supreme Court of the United States, if the case had been carried to that Court."

If the Statutes under discussion are to be so construed as to permit a judgment against one not brought into Court by virtue of its process, as is done by the opinion in this case, then those statutes violate the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

Conclusion

In conclusion, and with utmost deference and respect to the members of this Honorable Court, we most humbly and earnestly, on account of the importance and far-reaching effect of the opinion in this case not only to your petitioners, but to all members of unincorporated asso-

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ciations in South Carolina, that this Court do grant rehearing and reargument of this case.

Respectfully submitted,

F. Ehrlich Thomson
Attorney for Petitioners

Columbia, South Carolina

January 13, 1955

Certificate

I, John S. Nicholson, hereby certify that I am a practicing Attorney of this Court, and am in no way connected with this case. I further certify that I am familiar with the record in this case; that I have read the opinion filed January 3, 1955, and this petition, and that in my opinion the petition is meritorious.

John S. Nicholson

Decision on Petition for Reargument

Upon careful consideration of the within petition we find that none of the matters referred to therein was either overlooked or misapprehended by the Court in the preparation of the judgment heretofore filed; hence the petition is denied.

D. Gordon Baker C. J.

T. H. Stukes A. J.

C. A. Taylor A. J.

G. Dewey Oxner A.J.

Lionel K. Legge A. J.

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